No. 157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

MONDAKOTA GAS COMPANY, a corporation; MONTANA UTILITIES GAS COMPANY, a corporation; BOWDOIN GAS COMPANY, a corporation; THE HEART MOUNTAIN SYNDICATE, a voluntary association; and FLETCHER EDWARDS, *Petitioners*,

vs.

THE FEDERAL POWER COMMISSION, *Respondent*, MONTANA-DAKOTA UTILITIES COMPANY, *Intervenor*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEIF ERICKSON
347 N. Last Chance Gulch
Helena, Montana

JAMES R. BROWNING
ELLIS LYONS
1021 Tower Building
Washington 5, D. C.
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved:	
Section 28 of the Mineral Leasing Act of 1920	3
Amendment of August 12, 1953	3
Statement	4
Reasons for Granting the Writ	8
Conclusion	12
Appendix	1a
Opinion of Court of Appeals for the District of Columbia Circuit	1a
Judgment of Court of Appeals for the District of Columbia Circuit	8a
CASES CITED:	
Ex Parte Collett, 337 U. S. 55, 61	12
Fullerton-Krueger Lumber Co. v. Northern Pacific Railway Co., 266 U. S. 435	11
Gemsco v. Walling, 324 U. S. 244, 260	12
Montana-Dakota Utilities Co. v. Federal Power Commission, 169 F. (2d) 392 (C.A. 8) cert den—335 U. S. 853	5
Schwab v. Doyle, 258 U. S. 529	11
United States v. Heth, 3 Cranch 399, 413	11
COMMITTEE REPORTS:	
H. Rep. 764, 83rd Congress, 1st Sess.	12
S. Rep. 578, 83rd Congress, 1st Sess.	12
H. Rep. 1032, 83rd Congress, 1st Sess.	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ———

MONDAKOTA GAS COMPANY, a corporation; MONTANA UTILITIES GAS COMPANY, a corporation; BOWDOIN GAS COMPANY, a corporation; THE HEART MOUNTAIN SYNDICATE, a voluntary association; and FLETCHER EDWARDS, *Petitioners*,

vs.

THE FEDERAL POWER COMMISSION, *Respondent*,
MONTANA-DAKOTA UTILITIES COMPANY, *Intervenor*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on March 15, 1956, which affirmed an order of the Federal Power Commission permitting the intervenor, Montana-Dakota Utilities Company, to withdraw and cancel its common-carrier tariffs for the transportation of natural gas through its pipelines built in part upon and passing through the public domain.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 43-49) is not yet officially reported. The decision, findings and conclusions, and order of the Federal Power Commission's Presiding Examiner are set forth in the Record at pages 14-26, and the order of the Federal Power Commission affirming the decision of the Presiding Examiner is set forth in the Record at page 34.

JURISDICTION

The judgment of the Court of Appeals (R. 50), affirming the order of the Federal Power Commission (R. 34) was entered on March 15, 1956. The Court of Appeals had jurisdiction of the cause under the provisions of Section 19 of the Natural Gas Act, 52 Stat. 831, 15 U. S. C. 717(r). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Section 28 of the Mineral Leasing Act of 1920 authorized the Secretary of the Interior to grant rights-of-way through the public lands for pipe-line purposes for the transportation of natural gas upon the express condition, among others, that "such pipelines shall be constructed, operated and maintained as common-carriers * * *." On August 12, 1953 the said section 28 was amended so that the common-carrier provisions "shall not apply to any natural gas pipeline operated by any persons subject to regulation under the Natural Gas Act * * *." The question presented is whether the amendment of August 12, 1953 is applicable to a pipe line which was a common-carrier under a right-of-way granted pursuant to Section 28 of the Mineral Leasing Act of 1920 prior to the amend-

ment of 1953, or whether the amendment is applicable only to rights-of-way to be granted by the Secretary after the amendment.

STATUTES INVOLVED

1. Section 28 of the Mineral Leasing Act of 1920, as amended, 41 Stat. 449, 49 Stat. 678, 30 U. S. C. 185, prior to the amendment of August 12, 1953, provided in pertinent part as follows:

> "Rights-of-way through the public lands * * * may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in Section 181 of this title, to the extent of the ground occupied by the said pipe line, and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated and maintained as common carriers, and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing, with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable, provided * * *."

2. The amendment of August 12, 1953, 67 Stat. 557, added at the end of the quoted portion of Section 28 of the Mineral Lands Leasing Act, above, the following:

> "That the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act, or by any public utility subject to regulation by a State or municipal

regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality: * * *."

STATEMENT

Intervenor, Montana-Dakota Utilities Company, (hereinafter referred to as "Montana-Dakota") operates an integrated natural gas pipe line system in the States of Wyoming, Montana, North Dakota and South Dakota. It produces, purchases, transports and sells natural gas in interstate commerce for resale and is a natural gas company within the meaning of the Natural Gas Act. The system is constructed in part over public lands. The principal lines in Montana, North Dakota and South Dakota were built under rights-of-way granted by the Secretary of the Interior upon the condition that the lines be operated as a common-carrier within the meaning of the provisions of section 28 of the Mineral Leasing Act.[1]

The order of the Federal Power Commission, which was affirmed by the court below, grew out of a series of complaints and applications which were consolidated for hearing before the Commission's Presiding Examiner (R. 16). Prior to the time these proceedings were instituted before the Commission,

[1] The foregoing paragraph is part of the third paragraph of the Counterstatement of the Case at page 2 of the Joint Brief of Respondent and Intervenor in the court below. The entire third paragraph has been stipulated as correct (R. 13). The remainder of the paragraph is as follows: "The line from Worland, Wyoming to Baker, Montana, was built prior to the effective date of the August 12, 1953 amendment to the Mineral Leasing Act, but no right-of-way instrument was executed prior to the amendment by the Secretary of the Interior since there was dispute as to the exact terms to be incorporated in the right-of-way instrument."

Montana-Dakota had been required to file and publish a tariff for the transportation of natural gas as a common-carrier (R. 15).[2] And petitioner Mondakota and Industrial Gas Company had services agreements with Montana-Dakota under its common carrier tariff (R. 2, 15, 45).

The proceedings before the Federal Power Commission, which were consolidated for hearing, may be briefly summarized as follows:

The first application before the Federal Power Commission was instituted by intervenor Montana-Dakota on July 23, 1953 seeking an order authorizing it to abandon common-carrier transportation of natural gas where the shipper, in the absence of satisfactory credit arrangements, had not provided bond required by the tariff (R. 14-15). On May 27, 1954, intervenor Montana-Dakota filed an application for authority to suspend common-carrier transportation services for alleged non-payment of past services rendered by it to Industrial Gas Co. Responses to this application were filed by Mondakota and Industrial stating that the charges had been paid (R. 15). Another similar petition was filed on October 1, 1954 (R. 16). On June 24, 1954, intervenor Montana-Dakota filed a proposed revised tariff providing contract-carrier service in lieu of common-carrier service. The Commission

[2] Mondakota Development Company, predecessor of petitioner Mondakota Gas Company (hereinafter referred to as "Mondakota"), a producer and shipper of natural gas, had instituted proceedings in 1941 to secure the publication of a common-carrier tariff by Montana-Dakota, a result which was finally achieved by the decision in *Montana-Dakota Utilities Co.* v. *Federal Power Commission*, 169 F. (2d 392 (C.A. 8) cert. den. 335 U.S. 853. That decision details the history of Montana-Dakota's refusal to comply with the provisions of the Mineral Leasing Act.

suspended the proposed tariff and provided for a hearing (R. 15).

On July 2, 1954, Industrial Gas Co. and petitioner Mondakota filed a joint application for a determination of the reasonableness of intervenor's original gas common-carrier tariff (R. 15-16). On September 7, 1954, intervenor filed a complaint against Industrial Gas Co. and petitioner Mondakota and others claiming that the operations of the named defendants, with respect to natural gas transportation through the pipe lines of intervenor, were in violation of Section 7(c) of the Natural Gas Act. 15 U. S. C. 717(f). Answers to this charge were filed by Mondakota and Industrial and others (R. 16).

Finally, on October 1, 1954, petitioner Mondakota filed an application for a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act (15 U. S. C. 717(f)), authorizing it to sell natural gas to Eastern Clay Products Co. (R. 15).

By orders issued on November 15 and December 3, 1954 all of the complaints and applications were consolidated for hearing to commence on December 7, 1954 (R. 17). Mondakota and Industrial requested a postponement of the hearing on the ground that the time allowed was insufficient to prepare adequately for issues so complex and of such far reaching importance (R. 6, 17). The motions were denied (R. 6, 17) and hearings were held on December 7 and 8, 1954 (R. 6).

On the second day of the hearings, and without prior notice, Montana-Dakota moved orally that all their tariffs "relating to common carriage as well as con-

tract carriage be entirely and in all respects withdrawn and removed from the files and cancelled" (R. 20). At the conclusion of the hearing on December 8, 1954, petitioner Mondakota filed a motion for adjournment and on January 7, 1955 it filed a petition for reopening the record for further hearing. These were denied by the Examiner because "the issues presented are legal in nature and no useful purpose could be served by reopening the record for further proof" (R. 17).

On February 1, 1955, the Presiding Examiner rendered his decision (R. 14-26). Among other things he concluded "that the obligations of Montana-Dakota as a common-carrier of natural gas under the Mineral Leasing Act are terminated by the aforesaid amendment of August 12, 1953" (R. 20) and he granted Mondakota's oral motion made at the hearings above referred to (R. 24-25).[3]

Exceptions were taken to the Examiner's decision (R. 26-33), but by order dated March 16, 1955, the Commission affirmed the decision of the Presiding Examiner (R. 34). A timely petition for rehearing (R. 34-41) was denied on April 27, 1955 (R. 42).

A petition for review was filed by petitioner in the court below on June 24, 1955 (R. 2-11). By stipulation of all parties, approved by the court below (R. 11-13), it was agreed that the issues in the court below were (1) "Whether petitioners are aggrieved by the order of the Federal Power Commission herein, within the meaning of Section 19(b) of the Natural Gas Act * * * and Section 10 of the Administrative Procedure Act * * * and (2) "Whether the Act of August 12,

[3] In addition, all the other proceedings were either dismissed or terminated. (R. 25).

1953 * * * amending Section 28 of the Mineral Leasing Act * * * applied to pipelines operated by Montana-Dakota Utilities Co., a natural gas company subject to regulation under the Natural Gas Act, which pipelines were constructed prior to August 12, 1953, over the public domain under rights-of-way granted by the Secretary of the Interior (except that the pipe line from Worland, Wyoming, to Cabin Creek Compressor Station in Montana, although constructed prior to August 12, 1953, is on rights-of-way issued by the Secretary of the Interior subsequent to the passage of said Act)."

The court below concluded that petitioner "Mondakota has a sufficient interest to obtain review" and found it "unnecessary to consider the status of the other petitioners" (R. 46). On the merits, it concluded (R. 46-49) that the Act of August 12, 1953, amending Section 28 of the Mineral Leasing Act, applied to pipelines which were, at the time of the amendment, already subject to the common-carrier provisions of Section 28, and, accordingly, it affirmed the Commission's order (R. 50).

REASONS FOR GRANTING THE WRIT

The court below, in deciding that the amendment of August 12, 1953, 67 Stat. 557, served to relieve natural gas pipe lines from the common-carrier obligations which had initially been imposed upon them as conditions to the granting of their rights-of-way through the public lands, has decided an important question of federal law which has not been, but should be, settled by this Court. The question is important because in the western section of our country an interstate pipe line necessarily passes through public lands,

and by the decision below all of such pipe lines have been relieved of their former obligations to transport gas for others as common-carriers. The decision of the court below, if it is not reversed by this Court, will result in the loss of substantial investments of petitioner Mondakota, and of others similarly situated, in gas wells, gathering lines, compressor plants, and contracts. It will deprive producers and shippers of competitive markets for their gas. In addition, those who purchased gas from petitioner Mondakota will now be deprived of the right to purchase gas at competitive prices. On what seems to petitioners to be most doubtful legal grounds, the decision below has rendered ineffective over 20 years of effort on the part of the petitioner Mondakota, its predecessors and principal officers, to establish competitive prices for natural gas.

The court below was in error in its interpretation of the amendment of August 12, 1953. In rejecting petitioners' argument that the amendment applied only to natural gas pipelines granted rights-of-way after August 12, 1953, the court below stated (R. 47-48):

> The 1953 amendment provides that pipe lines otherwise bound by the common-carrier provisions shall be exempt where they are operated by persons subject to specified public regulation. The exemption rests upon operation. According to the terms of the amendment, if the operation of the pipe line is subject to the regulation specified in the amendment, the common-carrier provisions do not apply. The amendment makes no reference to conditions in grants of rights-of-way; it refers directly to operation. It speaks in the present, referring to present operation. If Congress had meant its exemption proviso to apply only to

> carriers thereafter securing rights-of-way, we think it would have cast its enactment in a different mold. It would have referred to conditions in grants.

The above quotation from the opinion of the court below highlights its error. The fact is that the Congress did precisely what the court below said it would have done if it had intended the exemption proviso to apply only to carriers thereafter securing rights-of-way. The Congress, in enacting the amendment of August 12, 1953, did not merely provide after the enacting clause that the common-carrier provisions of section 28 of the Mineral Leasing Act should not apply to any natural gas pipe line operated by a regulated person. If it had done so, the court below might have been correct. Instead, the Congress, in the amendment of August 12, 1953, provided that section 28 of the Mineral Leasing Act "is amended by inserting after 'Provided,' the following:", incorporating the exemption as an actual part of section 28. The amendment of August 12, 1953 does not exist independently; it is now an integral part of section 28. That section, as now amended, provides, in pertinent part, as follows:

> Rights-of-way through the public lands * * * may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of * * * natural gas * * * under such regulations * * * as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers * * * Provided, that the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act * * *."

When the exemption proviso of the August 12, 1953 amendment is read as part of section 28, as the Congress expressly provided it should, it is abundantly clear that the entire section applies to future grants of rights-of-way. Contrary to what the court below stated (R. 47) the amendment *does* make reference to conditions in grants of rights-of-way, because it sets forth the circumstances under which the common-carrier conditions, referred to earlier in the section, will not be required. The entire section 28, as it now reads, merely sets forth the powers and limitations of the Secretary of the Interior in granting future rights-of-way through the public lands for natural gas pipe lines.

We think that our interpretation of the amendment of August 12, 1953 is the only permissible one. Any other view retroactively destroys valuable rights of petitioner Mondakota and relieves Montana-Dakota of pre-existing obligations. Such a retroactive interpretation is not to be chosen unless the words in the statute are so clear, strong, and imperative that no other meaning can be annexed to them. *United States* v. *Heth*, 3 Cranch 399, 413; see also *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Railway Co.*, 266 U. S. 435; *Schwab* v. *Doyle*, 258 U. S. 529.[4] Not only does the language of the amendment not clearly evidence an intent to relieve pipe lines which were previously "constructed, operated and maintained" (30 U. S. C. 185) as common-carriers from their obligations as such carriers, but the amendment, when

[4] The court below was of the opinion that its interpretation did not render the amendment retroactive (R. 48). To be sure, the amendment applies to present and future operation, but what the court overlooked was that its interpretation in 1955 wiped out rights obtained, and obligations incurred, many years before.

incorporated into section 28, as Congress expressly declared it should be, can be read only as removing a limitation on the Secretary of Interior's authority in granting new rights-of-way through the public lands in the future.[5]

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted

LEIF ERICKSON
347 N. Last Chance Gulch
Helena, Montana

JAMES R. BROWNING
ELLIS LYONS
1021 Tower Building
Washington 5, D. C.

Attorneys for Petitioners

June, 1956.

---

[5] We think the language is so clear that resort to the legislative history is unwarranted. *Ex Parte Collett*, 337 U.S. 55, 61; *Gemsco* v. *Walling*, 324 U. S. 244, 260. But, in any event, the Committee and Conference Reports on the bill (H. Rep. 764, S. Rep. 578, H. Rep. 1032, 83rd Cong., 1st Sess.) in no sense require the conclusion of the court below. Nowhere do they state that the purpose of the amendment was to exempt pipe lines which already were obligated to perform common-carrier services. The purpose to "relieve" pipe lines (R. 48) of the common-carrier obligations is at best ambiguous and suggests a prospective application only, just as well as an application to existing common-carriers. Indeed, the Senate Report (S. Rep. 578, 83rd Cong., 1st Sess.) indicates a future application only when it states "The purpose of this proposed legislation is to amend section 28 of the act of February 25, 1920 * * * to permit companies subject to regulation under the Natural Gas Act * * * *to cross* United States Government land without incurring the obligation *to become* a common carrier." (Italics supplied).